

---

# WHETHER ARTICLE 377 VIOLATES THE FUNDAMENTAL RIGHTS?

---

Gaurav Rao, Bennett university

## ABSTRACT

This paper focuses on the outcome of the Naz Foundation case, which decriminalises homosexuality. But the fundamental issue is that the situation isn't getting any better. The legal classification of it as a prohibited activity is controversial. It goes against the natural order. The word, for example, 'natural order' in the context of sexuality Preferences are naturally ambiguous, unclear, and indefinite. Arbitrarily and, as a result, are likely to contravene

The Indian constitution's Articles 14, 15, and 21. The Naz is a fictional character. A line of IPC section 377 cases is endorsed by the court. represent a prudish Victorian morality, according to which Only 'protective' sex qualifies as a 'natural act.'

Even using a contraceptive during an intercourse would be considered abnormal, according to the Naz Foundation's thinking, considering that India is a developing country. has an issue with population growth. It is, in any case, Is it the role of the government to regulate such private matters? Acts that have no discernible negative consequences.

This study examines all of the hidden realities of Section 377 of the Indian Penal Code, as well as all of the criteria of Articles 14, 15, and 21 of the Indian Constitution, and concludes that It's tough to find any discernible differences. the difference between the terms "natural" and "unnatural" The courtroom did not take the more 'natural' approach to the debate Section 377 should be repealed as a whole may have been concerned about the decriminalisation that would follow. Paedophilia and other forms of inappropriate sexual behaviour bestiality.

## **INTRODUCTION**

It is done by animals such as elephants, birds such as penguins, and even butterflies. The ancient peoples It was freely performed by both Greeks and ancient Indians. It was completed. As a result of the existing prevalence of exclusivity. Homosexuality affects anywhere from 1% to 20% of the population.

To create a truly democratic and plural India, we must all work together to combat laws and policies that violate human rights and impede fundamental freedom.

Let us never forget the reality proclaimed in the Universal Declaration of Human Rights' first article: "All people are born free and equal in dignity." Everyone has the right to dignity and to all of their rights. without regard to the rights and freedoms enshrined in this declaration any form of differentiation."

We, as concerned Indian citizens, urge the repeal of section 377 of the Indian Penal Code. The Indian Penal Code (IPC) is a penal code enacted by the British in India in 1860. makes romantic love and private consenting relationships illegal. Adults engaging in sexual acts of the same sex.

The section of the IPC was created by the British and came into force in 1860. This law was also applicable in England until 1967, when the Sexual Offences Act was passed. England's Offence Act decriminalized homosexuality back.

### **Section 377, IPC 1860**

The 'Unnatural Offence' is defined under Section 377 of the Indian Penal Code, which states that "anyone commits an unnatural offence. "anyone willfully engages in sexual intercourse against the natural order with any man, woman, or animal, shall be punished by life imprisonment or by death. Incarceration of any kind for a period of time that isn't indefinite may last up to ten years and is also subject to fine"

### **Nature's order**

The Delhi High Court threw down section 377 of the Indian Penal Code 1860 in 2009, legalising the practice homosexuality.

'We find that section 377 of the IPC, insofar as it criminalizes consensual sexual conduct of adults in private, is violative of Article 14 of the Constitution,' stated Chief Justice Mr. AP Shah. "Articles 14, 15, and 21 of the United States Constitution."

Following the order, the Supreme Court considered an appeal against the Delhi High Court.

Citizens' Rights are being violated.

"The state shall not make any law which" is specified in Article 13(2) of the Indian constitution take away or limit the rights granted by this section and any law enacted in defiance of this paragraph shall be void to the extent of the breach" Section 377 of the Constitution provides for this. Some citizens' fundamental rights are violated by the IPC. India is an Indian country.

Section 377 of the Indian Penal Code is a breach of Article 14 of the Indian Constitution, which states that "Everyone is equal before the law." No one shall be denied equality before the state within the law, or the equal protection of the laws India's territory."

Article 14 also focuses on the idea of intelligible differentia, which states that there should be a clear connection between the two enacted provisions or acts, as well as the purpose for which they were enacted. They've been put in place for a specific reason. The same is true apparent that a legislature-enacted law must be clear and it must be logical.

A legislation is invalid for vagueness if its ban is not clearly specified, according to the Supreme Court. The reasoning for this is that the laws established should be explicit so that those who are impacted are aware of the genuine objective.

Furthermore, the Supreme Court decided that where a law lacks a clear interpretation, leaving those who must implement it in a sea of uncertainty, and the legislation prima facie takes away a given freedom, the law must be determined to be unconstitutional.

In the guise of procreative sex and non-procreative sex, Section 377 of the IPC makes an arbitrary and unjustifiable distinction between penile-veginal and penile-non-veginal sexual activities, so violating Article 14's promise of equal protection before and under the law.

## **Vagueness Doctrine**

The theory of vagueness, often known as the void for vagueness doctrine, claims that a law can't be enforced if it's too unclear. The law is so ambiguous or perplexing that the typical individual cannot understand it. I couldn't figure out what was prohibited or what was allowed. The penalties are the consequences of breaching the law. Vagueness is a quality. Generally regarded as a matter of due process, because a law that is either too ambiguous or too complex to comprehend is perplexing, and it doesn't give you enough notice persons who believe that a certain action is essential or desirable unacceptable.

## **Rational Nexus Isn't Existing**

There should be no reasonable nexus under section 377 of the IPC. It is a well-known fact that in order to pass, the reasonable classification test mandated by According to Article 14 of the Constitution, classification must be made satisfy two criteria:

1. The classification must be based on a discernible distinction.
2. The differentia must be connected to the differentia in a logical way. The behaviour in question was intended to attain a certain goal question. In other words, there must be a causal relationship. There is a link between the classification system and the basis of classification the subject of the statute in question.

Using these concepts, one would wonder whether the division of sexual intercourse into two categories, 'natural' and 'unnatural,' is a logical one. And, maybe more importantly, whether it is sensible. Section 377 has a link to the object that underpins it.

## **Article 15 is violated by Section 377.**

"The State shall not discriminate against any citizen," says Article 15 (1) of the Indian Constitution. On the basis of religion, race, caste, sex, and location alone of birth, or any combination of them.

"Sex" is a fluid term that does not refer to a fixed idea. There should be no distinction between male and female biological sex. It is not a necessary condition that the banned ground is expressly stated in the law the foundation for classification.

"The Courts are always required to interpret any statute using the 'schematic and teleological' approach of interpretation," the Supreme Court stated. It simply indicates that the judges do not follow the literal interpretation of the law the grammatical structure or the meaning of the words the end of the sentence They follow the plan of action which is the reason for it.

As a result, in an introduction circumstance, the term "sex" has a broader meaning and includes sexual introduction, which includes homosexual people. The denial of sex-based separation is supposed to make it impossible to link conventional personal behaviour to sexual orientation. The main goal of the critical action against sex segregation is to prevent behaviour that treats people differently because they don't fit into preconceived notions about "normal" sexual orientation elements.

At the present moment, section 377 of the Indian Penal Code infringes on a person's fundamental rights. And in the Indian Constitution it is clearly provided that the law cannot discriminate any people on the basis of race, caste, sex etc. and according to the law the homosexual people also have the right to not to discriminate on the grounds of sex.

### **Article 21 is violated by Section 377**

Article 21 of the Indian Constitution guarantees everyone the right to life and personal liberty. For many, it has become an infinite source other people's life These rights are available to you just as much as they are to me. As opposed to a foreigner, a citizen. Furthermore, this article has been The Supreme Court of the United Kingdom has awarded the supreme position to the Hon'ble Supreme Court of the United Kingdom. Court. Homosexuals are also included in this category. They are also human beings, as stated in article 21. In the case of Kharak Singh v. Supreme Court, the Supreme Court upheld the lower court's decision. According to the State of Uttar Pradesh<sup>9</sup>, the right to life is the most fundamental of all human rights. 'Life' is a word that has a lot of connotations. Article 21 does not limit itself to just animals. However, the term 'life' has a broader connotation than a solitary animal's existence in society .

All were included in the inhabitation against its deprivation. Life is enjoyed by those limbs and faculties. The mutilation of the human body is likewise prohibited under this rule body by amputation of any part of the body, or any portion of the body by amputation of any part of the body or another organ that the soul uses to communicate with the outside world Also, sexual orientation isn't taken into account. However, if a person is robbed of the exterior part of the

body, This also entails having a sexual orientation. Body mutilation is a term used to describe the act of mutilating someone's body.

The honorable court held in *Bandhua Mukti Morcha V. Union of India*<sup>10</sup> that "there are minimum human necessities that exist in order to enable a person to function." No state has the right to deny people the right to live in dignity remove any action that might rob a person of their liberty."It's a pleasure to be able to appreciate this basic necessity"

The following are the basic necessities of a person's life:

1) Privacy

2) Human Dignity is a concept that has been around for a long time.

3) Physique

### **Right to Personal Space**

The term "privacy" refers to the "region of a man's life in which, under any given set of circumstances, a reasonable man with an understanding of the law would consider private. "recognition of the legitimate needs of the people. Invasion would be seen negatively by the community." Despite the fact that India's constitution is similar to that of the United States, The right to privacy is not guaranteed under the constitution. Despite the fact that we cannot state that the right to privacy is explicit, we can say that it is. Article 21 of the Constitution makes this implied. a quandary arisen for the first time in the case of *Kharak Singh v. State of California*. U.P.<sup>11</sup> Is the right to privacy included in the right to privacy? to the right to personal liberty Speaking on behalf of the court, Justice Subba Rao "Right to privacy, but not absolute," said a small group of people. It is a vital right, as stated in our constitution. "Personal liberty is an essential component."

It is in addition recognized that at the unit of the privilege to protection are those difficulties associated with one's private existence and close relationships. This circle of private intimacy and self-sufficiency must enjoy individuals to build personal ties without hindrance from the outside nation or from the State. The right to protection is thus established on the premise that there is a zone of security created by several fundamental rights into which the state cannot intrude.

It is stated that sexual relationships between persons, whether homosexual or heterosexual, come inside the protected zone. By criminalizing unrepeatable consenting sexual activities, Section 377 disregards the right to privacy. As a result, the criticized region blatantly disregards the proper level of protection for the general public and, as a result, jeopardizes the ideal of life and individual liberty guaranteed by the Indian Constitution.

### **Dignity of Man**

The case law also acknowledges that the right to privacy stems from and is inextricably linked to the right to liberty. Each individual is entitled to dignity.

The honorable Supreme Court declared in *Gobind v. State of Madhya Pradesh*<sup>13</sup> that "privacy-dignity claims need to be addressed with care and to be considered. "Only where there is a significant countervailing interest is a request refused is demonstrated to be superior."

Poise is concerned with an individual's rights at that time, and is linked to individual self-awareness and self-governance. If this happens, that the right to protection stems from a concern for others. It should also be an expression of human grandeur or dignity individualistic right to collect from a man wherever he may be or Could be.

In this matter, section 377 of IPC affects dignity of a person as it exposes a person of his sexual orientation and also punishes him and sends him to prison which violates his right to live a dignified life.

"Every act that offends or degrades human dignity would constitute deprivation pro tanto of this right to life," the Supreme Court said, adding that "it would have to be in conformity with a reasonable, fair, and just procedure established by law that meets the test of other basic rights." <sup>14</sup> In this situation, section 377 offends and inhibits the expression of the human self of sexuality, notably among men who have sex with men, and so infringes their right to live with dignity by criminalizing private, consensual sex between adults. It also fails to pass the test of other fundamental rights. Section 377 is not a reasonable, fair, or just legislation, as explained above, under the requirements of articles 14, 15 (1)

### **Health is a human right.**

Because of the fear of being prosecuted, these LGBT communities are generally unwilling to

expose same-sex activities organizations in charge of implementation, with a large region to cover invisible, unavailable, and pushing the envelope subterranean sickness, posing a problem for It will take a long time for the Ministry of Health to reach them. Authorities from the According to UNAIDS, there is no information on LGBT people. India's population, because acquiring such information is illegal. In accordance with Section 377 It expresses a clear understanding of the problem. As a result of this, made by the hated area Even UN authorities are not prepared to avoid this portion. In India, there is an AIDS epidemic.

The Constitution of India's Basic Features are violated by Section 377.

The IPC's Section 377 denies the respected aims particularly in the preface: Justice, Liberty, and Equality to folks who are gay The Basic Goals are made up of these objectives. A feature of the United States Constitution. It also dismisses the concept of justice and equal security, resulting in discrepancy and as a result, it is a blatant violation of the Basic Feature. As a result, the Constitution can be tampered with. The court will deal with it.

### **Case of the Naz foundation**

Under the watchful eye of the Delhi High Court, the Naz Foundation launched an open intrigue action in 2001. Section 377 of the Indian Act has a spiritual legitimacy 1860 Penal Code The Delhi High Court dismissed the case. In 2004, a petition was filed claiming that the investigation was justified. There was no reason for activity because it was intellectual. A subsequent audit appeal will be denied as well. At that time, the Naz Foundation had taken a Special Leave. The Supreme Court is keeping a close eye on the petition. India is putting the Delhi High Court's requests to the test. The Supreme Court overturned the decision on 03.02.2006. The Delhi High Court granted the petition and remanded the case. Returning to the Delhi High Court for a decision of advantage.

### **Judgment**

The case was heard in front of a bench that included Chief Justice Ajit Prakash Shah and Justice S.Muralidhar, and the verdict was handed out on July 2nd. The Supreme Court of the United States ruled in 2009 that people have the freedom to be proud of themselves protection within the right to life and liberty Article 21 (under the Fundamental Right to Information) protects



you. The court upheld the Constitution's freedom charter) and ruled that these people were harmed by the outlawing of consensual gay sex rights.

The Court further found that Section 377 violates the guarantee of equity enshrined in Article 14 (the fundamental Right to Equality charter) of the Constitution. Because it creates an illogical order and singles out LGBT people as a group, the Constitution should be repealed. Anger and outrage directed against a certain social gathering or weak individuals minority, it was said, is not a significant ground. Article 14 of the Constitution provides for an arrangement. In light of specified circumstances, the Constitution restricts separation. Sex is one of the qualities. The Supreme Court ruled that "sex" is a legal term. Integrates both natural and sexual sex introduction, and then segregation on the basis of race. Under the law, it is not permissible to introduce a person to another person on the basis of sexual attraction. Article 15. The Court also took note of the fact that the Article 21 of the Constitution includes the right to life. Section 377 of the Civil Rights Act of 1964 protects the right to health and well-being. Since it is an impediment to general well-being, HIV aversion efforts are hampered.

The Court did not overturn Section 377 in its entirety. Insofar as it criminalizes consenting sexual demonstrations of any kind, the region has been declared illegal. Adults in a private setting. The decision remains faultless due to the fact that it is applicable to non-residents non-vaginal intercourse and intercourse with consent minors are included. The court stated that the decision was made in the best interests of the plaintiff would be in effect until Parliament decided to change the law.

## **Conclusion**

Section 377 of the Indian Penal Code was enacted in 1860, during the British colonial period. India is under British authority, and the British parliament has issued a legislation on the subject. In India, the law was enacted in 1860, and section. According to Section 377 of the Indian Penal Code, "anyone freely engages in carnal intercourse against the will of the court. Any man, woman, or animal in nature shall be a life sentence of imprisonment or a fine incarceration of any kind for a period of time that isn't indefinite may last up to ten years and is also subject to fine," therefore this section of the Indian Penal Code is unconstitutional. The person's fundamental rights, as outlined in this section that homosexual intercourse or consenting intercourse between men and women of the same gender.